FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1986-6

of

VICE CHAIRMAN JOHN WARREN McGARRY

My dissent to Advisory Opinion 1986-6 involves the language adopted by the Commission in answer to questions posed by the Fund for America's Future regarding expenditures in connection with the election of precinct delegates in Michigan in 1986. This dissent is based upon my reading of the Commission's regulations at 11 C.F.R. 110.14 and upon my position that it makes no sense for a multicandidate committee with which a prospective presidential candidate is closely and actively associated to make expenditures to such precinct delegate candidates, or to recruit or otherwise encourage such candidates, and to not have such expenditures count against that candidate's expenditure limitations under the Federal Election Campaign Act once he or she becomes a candidate, since such expenditures would unquestioningly count against those limitations if incurred on or after the date of candidacy.

First, it must be stressed that 11 C.F.R. 110.14(a) states that the Commission's delegate regulations apply "to all levels of a delegate selection process..." In the case of the Michigan precinct delegates, it is clear from the information provided to the Commission with regard to the selection and role of these delegates that the elections in 1986 of persons chosen as precinct delegates will be the primary opportunity of the voters in Michigan to have a voice in the selection of delegates to the nominating convention of the Republican Party in 1988. It is also clear that persons chosen as precinct delegates will be inextricably intertwined in the process of choosing delegates to the national convention. Therefore, there should be no question but that the Commission's regulations at 11 C.F.R. 110.14 apply to the election of delegates at the precinct level.

11 C.F.R. 110.14(c) states that "(c)ontributions to a delegate for the purpose of furthering that delegate's selection are not subject to the limitations of 11 C.F.R. 110.1 and 110.2 and 2 U.S.C. 441a(a)(1) and (2)." Under this provision the Fund can make unlimited expenditures to a delegate. However, 11 C.F.R. 110.14(c) goes on to state that "(c)ontributions made to a delegate by the campaign committee of a presidential candidate count against that presidential candidate's expenditure limitations under 11 C.F.R. 110.8(a) and 2 U.S.C. 441a(b)." Section 110.14(c) therefore requires that contributions made by a presidential candidate's campaign committee to a delegate, while unlimited in amount, must count against the candidate's expenditure limitations, assuming that the candidate receives public matching funds pursuant to 26 U.S.C. 9033, et al.

The explanation and justification for 11 C.F.R. 110.14 includes the statement that contributions made to a delegate to further his or her selection are not to be considered contributions to any presidential candidate, regardless of whether the delegate has declared support for a candidate. Reading the regulatory language of 11 C.F.R. 110.14(c) and the explanation and justification together, I have determined that the more general language of the explanation and justification was intended to protect possible presidential candidates from the effects of contributions made to delegates by persons or committees unrelated those possible candidates. It was never intended to shelter an ultimate presidential candidate from the delegate-related activities of his or her own political action committee.

The specific language of 11 C.F.R. 110.14(c) regarding the effects of a contribution to a delegate by the campaign committee of a presidential candidate upon that candidate's expenditure limitations would have to include contributions made to such a delegate by that candidate's political action committee prior to the date of his or her candidacy. Otherwise, the day before that candidacy the political action committee could make unlimited expenditures to delegates with no effect upon the expenditure limitations which would be triggered on the date of candidacy - a totally anomalous result.

The post-candidacy effect upon the eventual candidate's spending limitations is the focus of this dissent. Before that person becomes a candidate his or her political action committee should be treated as any other with regard to delegate-related expenditures. In other words, such a committee can make unlimited contributions to a delegate. Such contributions, once they reach more than $5,000, should not trigger candidacy. It would be overreaching for the Commission to push someone into candidacy when the political action committee is otherwise in total compliance with the Commission's delegate regulations. But, once an individual closely associated with that political action committee becomes a candidate for president, he or she should have to apply to his or her expenditure limitations expenditures made by the political action committee to further that individual's nomination. Expenditures in connection with the precinct delegate selection process in Michigan would fall into this category.